

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SARAH DUNFIELD)	
Claimant)	
)	
VS.)	
)	
STONEBROOK RETIREMENT COM.)	
Respondent)	Docket No. 1,031,568
)	
AND)	
)	
KANSAS HEALTHCARE ASSOCIATION)	
WC INS. TRUST)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the January 18, 2008 Award by Administrative Law Judge (ALJ) Bryce D. Benedict. The Board heard oral argument on April 15, 2008.

APPEARANCES

Roger D. Fincher, of Topeka, Kansas, appeared for the claimant. Kip A Kubin, of Kansas City, Missouri, appeared for respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties agreed that claimant's average weekly wage is no longer in dispute. They also agreed that the only evidence contained within the record as to task loss is the opinion expressed by Dr. Edward Prostic of 12.8 percent.¹

¹ This percentage is based upon his opinion that claimant lost the ability to perform 5 of 39 tasks.

ISSUES

The ALJ concluded that while claimant established that she gave respondent timely notice of her July 3, 2006 accident, she had otherwise failed to sufficiently prove that she sustained a permanent functional impairment as a result of that accident or that she had put forth a good faith effort to find appropriate post-injury employment. He went on to assess the claimant a permanent partial general (work) disability of 15.6 percent, which reflects a 10.2 percent task loss averaged with a 21 percent wage loss. Finally, the ALJ rejected respondent's contention that claimant had a 7 percent preexisting impairment.

The respondent requests review of the Award alleging that some of the above-mentioned findings were in error or based upon evidence that was not within the record. Respondent urges the Board to reverse the ALJ's factual finding to reflect claimant's failure to provide timely notice of her injury. Additionally, respondent argues it is entitled to a credit for claimant's preexisting impairment as a result of a 2004 low back injury. Lastly, respondent maintains that it should not be responsible for claimant's medical bills associated with her surgery in October 2006 as a treating physician had been designated.

Claimant argues the ALJ's Award should be modified as well, based upon her actual wage loss following her termination from respondent's employ and to include a finding of a 12 percent permanent partial functional impairment with no offset or credit for an alleged preexisting impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

There is no dispute as to the underlying facts surrounding claimant's accident on July 3, 2006. Claimant was employed as a CNA and while assisting a patient, she felt a "pop" in her back which resulted in immediate pain in her low back. At the preliminary hearing, claimant denied telling anyone of her injury that night. She indicated that there was no administrator on duty so she intended on reporting the event on July 5, her next scheduled work day.²

At the regular hearing, claimant testified that the Director of Nursing was not on duty at the time of her accident but she went on to say that she told the charge nurse, a white

² P.H. Trans. at 12. It is unclear from the record if the "administrator" claimant refers to is also known as the Director of Nursing. A fair reading of the record suggests that they are one and the same and that the individual who holds that position is named "Laura".

woman with short hair and a pony tail, of the accident, including the time, the patient that was involved and the room in which it occurred. Claimant says she was told to go talk to the Director of Nursing, Laura, who was not then on duty.

On July 5, 2006, the day claimant was scheduled to work, she awoke and was experiencing significant pain in her low back. At the preliminary hearing claimant testified that she asked her boyfriend to call her employer and let them know she was in pain.³ At the regular hearing claimant explained that after she was admitted to the hospital she contacted Laura to let her know she was in the hospital. Claimant further testified that while in the hospital she filled out an accident form and the hospital faxed that form to respondent. Claimant also testified that she repeatedly called Laura and left messages, but she never received a call back. The only communication claimant had from respondent while in the hospital was a letter terminating her employment.

Claimant was hospitalized for 13 days and was treated conservatively for her back complaints.⁴ She was released from the hospital on July 18, 2006. Respondent directed claimant to Dr. Adrian Jackson for further evaluation and treatment. Dr. Jackson first saw claimant on August 7, 2006 and after reviewing two MRI's done on July 5 and July 10, 2006 which revealed (in his view) small foraminal disc protrusions and mild degenerative changes, he diagnosed her with a lumbar strain. He recommended physical therapy which she failed to consistently attend.

After leaving the hospital claimant worked at several jobs, earning anywhere from \$5.85 an hour to \$8.10 an hour. According to claimant she was unable to do these jobs due to her back complaints and would eventually have to quit. Dick Santner, a vocational specialist, prepared a list itemizing claimant's vocational tasks over the last 15 years. He opined that given claimant's educational and vocational background, her medical restrictions, her geographical location⁵ and attendant limited job market, claimant could, at best, expect to make \$7 per hour.

On September 25, 2006, claimant was again seen by Dr. Jackson who reported she was doing quite well.⁶ Claimant denies telling Dr. Jackson that her symptoms were relieved, only telling him that they were not totally absent.⁷ He concluded that she was not

³ *Id.*

⁴ Included within her treatment was a psychological examination. Claimant had undergone an unrelated but nonetheless significant personal trauma and the physician treating her wanted to ensure that she had no lasting effects from that unrelated event that might inhibit her recovery.

⁵ Claimant resides in Council Grove, KS.

⁶ Jackson Depo. at 9.

⁷ P.H. Trans. at 18.

a surgical candidate so he released her to return to regular work duties with a zero percent permanent partial impairment as a result of her injury.⁸ Dr. Jackson testified that the disc protrusions he saw on the MRI's could, in some people's view, be considered a herniated disc, but he does not use that word.⁹

On October 13, 2006, claimant presented to the emergency room at Stormont Vail Hospital in Topeka, Kansas complaining of significant pain in her low back and was admitted. According to claimant, she was asked about her recent activities and whether she had lifted anything. She says she told them that a few days before all she had lifted were plastic grocery sacks weighing very little. Following another MRI, claimant was diagnosed with a herniated disc at L5-S1. When conservative methods did not resolve her complaints, she was offered surgery by Dr. Lee Smith, a board certified orthopaedic surgeon.

Dr. Smith performed a laminectomy and discectomy at the L5-S1 level on October 18, 2006. According to Dr. Smith, the July 10, 2006 MRI showed the herniation and the compressed nerves that were involved in the October 2006 onset of pain. He attributed her need for surgery to the July 2006 accident, rejecting respondent's contention that lifting the grocery sacks caused the herniation and the resulting need for surgery.

At her lawyer's request claimant was evaluated by Dr. Edward Prostic in April 2007. Dr. Prostic reviewed the earlier MRI reports and concluded that claimant sustained a 12 percent permanent partial impairment to the whole body as a result of her operated lumbar disc, the mild loss of range of motion and her continued radicular symptoms due to the July 3, 2006 accident. He assessed permanent restrictions that limited her ability to lift weights over 15-20 pounds on a frequent basis or 40 pound more than occasionally. Dr. Prostic also reviewed Mr. Santner's vocational analysis and based upon these restrictions, he concluded that she had lost the ability to perform 5 out of the 39 identified tasks, which is a 12.8 percent task loss.

One other physician testified, that being Dr. Joseph Huston, the orthopaedic surgeon who evaluated claimant's condition in 2004. According to him, claimant bore a 7 percent permanent partial impairment following her earlier injury which resulted in a bulging disc which was evident by the MRI taken at the time. He testified that his 7 percent impairment was based upon the *Guides*¹⁰, apparently based upon Table 75 on page 113 rather than on the range of motion model also contained within the *Guides*. He further confirmed that claimant was not considered a surgical candidate as of his 2004 evaluation.

⁸ Jackson Depo. at 10-11.

⁹ *Id.* at 14.

¹⁰ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

The first issue to deal with is whether claimant provided timely notice. Because if she did not, then the balance of the parties' arguments are moot. K.S.A. 44-520 provides:

Notice of injury. Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Claimant's testimony on this issue is somewhat inconsistent. Her story of when and to whom she provided notice has, at times, varied somewhat. But her testimony is not altogether unreliable and it is worth noting that respondent did not offer any testimony to contradict claimant's testimony. And in fact, by August 7, 2006, respondent knew of claimant's accident and had arranged for her to be evaluated by Dr. Jackson. So, whether it was by virtue of an in person conversation with the charge nurse on July 3, 2006, with Laura on the phone on July 5, 2006, or by virtue of a faxed accident report on July 5, 2006 or subsequent phone messages, respondent acted in such a manner so as to acknowledge that an injury occurred and an evaluation and/or treatment was necessary. Accordingly, the Board finds by the barest of margins that claimant met her burden of showing that she gave notice as required by the Act.

Respondent further defends its position by asserting that claimant suffered from an intervening accident when she lifted grocery sacks in October 2006. The ALJ concluded that the evidence did not support this defense and concluded that claimant had not suffered an intervening accident.¹¹ The Board agrees with this finding. Claimant maintains that she was asked about her activities in the days before the onset of her pain and she responded that the heaviest thing she had lifted was a grocery sack that weighed no more than a few pounds. While one physician conceded that claimant *could* have injured her disc doing this maneuver, it is clear that she did not lift the bag and suffer an immediate onset of pain. The pain that sent her to the hospital on October 13 occurred in the early morning when she was waking up and getting out of bed. And the medical testimony

¹¹ ALJ Award (Jan. 18, 2008) at 5.

strongly suggests that the MRIs done in July 2006 revealed the disc herniation which had yet to become symptomatic. The ALJ's conclusion that no intervening accident was proven is affirmed.

Turning now to the permanent impairment aspect of this claim, claimant maintains she is entitled to a permanent partial general (work) disability under K.S.A. 44-510e(a) and respondent argues that regardless of the extent of claimant's work disability, it is entitled to a 7 percent credit to reflect claimant's preexisting impairment.

Permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

This statute must be read in light of *Foulk* and *Copeland*.¹² In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it.¹³

¹² *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

¹³ But see *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007), in which the Kansas Supreme Court held, in construing K.S.A. 44-510e, the language regarding the wage loss prong of the permanent disability formula was plain and unambiguous and, therefore, should be applied according to its express language and that the Court will neither speculate on legislative intent nor add something not there.

Here, the ALJ concluded the claimant's attempts at finding appropriate employment following her accident were less than acceptable and therefore he imputed a wage to her based upon \$7.00 per hour, which yields an average weekly wage of \$280 and gives rise to a 21 percent wage loss. On the other hand, claimant contends that her efforts at finding employment were sufficient and that her actual wage loss of 100 percent should be used.

The Board agrees with the ALJ's analysis. Her sporadic periods of employment and vague explanations as to why she terminated those employment relationships support the conclusion that claimant failed to demonstrate a good faith effort to find employment. The \$280 per week figure should be imputed and the 21 percent wage loss is affirmed.

Neither party took issue with the 13 percent¹⁴ task loss and as a result, the Award is hereby modified to reflect a 17 percent work disability.¹⁵

As for respondent's request for a 7 percent credit pursuant to K.S.A. 44-501(c) for claimant's preexisting impairment from her 2004 low back injury, the ALJ declined to award this credit as he believed Dr. Huston's rating was not done in the manner prescribed by the *Guides*.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injury is an aggravation of a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.¹⁶

The Board interprets the above statute to require that a ratable functional impairment must preexist the work-related accident. The statute does not require that the functional impairment was actually rated or that the individual was given formal medical restrictions. But it is critical that the preexisting condition actually constitutes an impairment in that it somehow limited the individual's abilities or activities. An unknown, asymptomatic condition that is neither disabling nor ratable under the AMA *Guides* cannot serve as a basis to reduce an award under the above statute.

¹⁴ The correct figure is 12.8 but for simplicity, this figure is rounded to 13 percent

¹⁵ The ALJ miscalculated the task loss figure using 10.2 rather than 12.8. Thus, even though the factual findings are affirmed, the final work disability finding should be modified to correct the mathematical error.

¹⁶ K.S.A. 1998 Supp. 44-501(c).

A physician may appropriately assign a functional impairment rating for a preexisting condition that had not been rated. And the physician may use the claimant's contemporaneous medical records regarding the prior condition. The medical condition diagnosed in those records and the evidence of the claimant's subsequent activities and treatment must then be the basis of the impairment rating using the appropriate edition of the *AMA Guides*.

The difficulty with the ALJ's conclusion in this case is that he went outside the record to gather support for his conclusion that Dr. Huston's 7 percent rating was not made pursuant to the *Guides*. In order to do this, the ALJ, without prompting or request from the parties, took judicial notice of the entire contents of the *Guides*, something that this Board considers to be improper¹⁷ without any request or hearing. And after having done so, the ALJ quite clearly used portions of the *Guides* which he deemed relevant as a basis for disregarding the rating of preexisting impairment offered by Dr. Huston. He used the same rationale for disregarding the opinions expressed by Dr. Prostic.

It is not for the trier of fact to reach out and sweep into the record anything that he or she feels will help the parties try their case or justify his or her ultimate conclusions. The fact finder must only rely upon the evidence placed into the record by the parties, nothing more. Put in its simplest terms, the ALJ cannot go outside the record in deciding any given claim. Thus, the ALJ's adoption of the *Guides*, aside from those portions relied upon or referenced by the physicians in this case is excluded.

Once those references are excluded, the ALJ's decision to exclude Dr. Huston's preexisting impairment evaluation is unsupported. Indeed, the Board finds that Dr. Huston's analysis was based upon the 4th edition of *Guides* as he testified as much. He indicated which table and page was used. His opinions were based upon his evaluation of claimant back in 2004, including the records generated at that time. None of claimant's cross examination revealed any weakness in his analysis or invalidity in his evaluation of claimant's impairment under the *Guides*. For these reasons, the Board finds that respondent is entitled to a credit of 7 percent against claimant's overall work disability, leaving her with a net 10 percent work disability.

The ALJ ordered respondent to pay the outstanding balances on those bills associated with claimant's hospitalization in October 2006, excepting those billings for the psychiatric evaluation. In light of the foregoing findings, the Board affirms this finding.

Finally, the ALJ declined to assess any functional impairment rating as he concluded that "claimant has failed to establish what her functional impairment might be as a result

¹⁷ *Shockley v. Dick Edwards Lincoln Mercury*, No. 1,022,879, 2007 WL 1390700 (Kan. WCAB Apr. 10, 2007).

of the work accident.”¹⁸ He reasoned that Dr. Prostic’s functional impairment opinion (12 percent to the whole body) was tendered without benefit of the *Guides* as required by the statute. He went on to note that “there is no DRE category 12 percent lumbar impairment in the *Guides*.”

Dr. Prostic did, in fact, testify that he rendered his opinion “according to the Fourth Edition of the AMA Guides”¹⁹ and the Board finds his impairment opinion persuasive under these facts and circumstances. However, because respondent has established a 7 percent preexisting impairment, the net result is a 5 percent permanent partial functional impairment, a figure that is less than the 10 percent work disability found above.

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated January 18, 2008, is affirmed in part and modified in part as follows:

The claimant is entitled to 10.69 weeks of temporary total disability compensation at the rate of \$236.41 per week or \$2,527.22 followed by 41.50 weeks of permanent partial disability compensation at the rate of \$236.41 per week or \$9,811.02 for a 10 percent work disability, making a total award of \$12,338.24.

As of May 21, 2008 there would be due and owing to the claimant 10.69 weeks of temporary total disability compensation at the rate of \$236.41 per week in the sum of \$2,527.22 plus 41.50 weeks of permanent partial disability compensation at the rate of \$236.41 per week in the sum of \$9,811.02 for a total due and owing of \$12,338.24, which is ordered paid in one lump sum less amounts previously paid.

All other findings and conclusions contained within the ALJ’s Award are hereby affirmed to the extent they are not modified herein.

¹⁸ ALJ Award (Jan. 18, 2008) at 6.

¹⁹ Prostic Depo. at 9.

IT IS SO ORDERED.

Dated this _____ day of May, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
 Kip A. Kubin, Attorney for Respondent and its Insurance Carrier
 Bruce D. Benedict, Administrative Law Judge